No. 82-2140

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILBUR HOBBY,

PETITIONER,

v.

UNITED STATES,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Court has limited the grant of certiorari to the following question:

"Whether the courts below erred in condoning the systematic exclusion of Blacks from appointment as foremen of federal grand juries."

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fn. The parties to this litigation are set forth in the caption. Mr. Mort Levi was indicted, tried and convicted with Hobby as a co-conspirator. He did not petition for review from the affirmance by the COURT OF APPEALS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the Court of Appeals is reported at 702 F.2d 466, and is set out in the appendix to the Petition for Writ of Certiorari (hereinafter cited as "P.A."). The order denying rehearing,

which is not reported, is set out in the Joint Appendix at p. 123 (hereinafter cited as "J.A."). The motion to dismiss the indictment due to improper selection of grand jury is set out in J.A. p. 32; and the order of the District Court denying the motion is set out at J.A. 113-114.

JURISDICTION

Petitioner Hobby was indicted in the United States District Court for the Eastern District of North Carolina on February 10, 1981.

The judgment of the Court of Appeals was entered on March 9, 1983. A timely Petition for Rehearing and suggestion for rehearing en banc was denied on April 29, 1983. The Petition for a Writ of Certiorari was filed on June 28, 1983, and was granted on December 12, limited to the third question. This Court has jurisdiction under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED IN THIS CASE

The Fifth Amendment to the Constitution provides in pertinent part that:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a Grand Jury ... nor be deprived of life, liberty, or property, without due process of law ...."

The Sixth Amendment to the Constitution provides in pertinent part that:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...."

Title 18 USC § 243 provides that:

> "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any state on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection of summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000."

The Jury System Improvements Act of 1978 provides in relevant part as follows:

28 USC § 1861.

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligtion to serve as jurors when summoned for that purpose.

28 USC § 1862

Discrimination prohibited

> No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

Rule 6 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

(a) Summoning Grand Juries. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(c) Foreman and Deputy Foreman. The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have the power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(f) Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a judge in open court. If the defendant is in custody or has given bail and 12 jurors do not concur in finding an indictment,

the foreman shall so report to the court in writing forthwith.

STATEMENT OF THE CASE

Wilbur Hobby was the long-time President of the North Carolina AFL-CIO, and as such was a frequent participant in the various state sponsored programs to train the unemployed for useful employment. Prior to the events here in issue, he had signed some 15 contracts with the state of North Carolina, its departments and agencies under the Comprehensive Employment and Training Act of 1973, commonly known as CETA. Mort Levi, a Black, was employed by the North Carolina AFL-CIO to prepare CETA proposals, and operate the programs on a day to day basis.

Wilbur Hobby and Mort Levi were indicted as co-conspirators in connection with a CETA contract to train 40 unemployed and unskilled young men and

women as computer operators. The contract was in the name of Precision Graphics, a printing company owned by Wilbur Hobby. It authorized payment of $130,833. The contract was fully performed. The students were trained, and almost all obtained employment with their new skills. Precision Graphics billed the state only $88,786 (some $42,047 less than the contract price) for its services. Nonetheless, Wilbur Hobby and Mort Levi were indicted by a federal grand jury for fraud in connection with this contract in the amount of approximately $15,000.

Prior to the trial, petitioner moved to dismiss the indictment due to improper selection of grand jurors (J.A. 32). The motion was based on the Fifth and Sixth Amendments to the Constitution, The Jury System Improvements Act of 1978, and Rule 6 of the Federal Rules of Criminal Procedure. (J.A. 32).

A hearing was held on this motion, and the principal witness was James M. O'Reilly, a statistical social science consultant. (J.A. 58) Mr. O'Reilly had compared the general population of the eastern District of North Carolina with the jury population--the "actual population in the community with the Jury Wheel." (J.A. 63-64).

Mr. O'Reilly testified that Blacks were substantially underrepresented on the Jury Wheel (J.A. 70-71, 80); that blue collar workers are "very substantially underrepresented" (J.A. 81); that those without a high school diploma "are substantially underrepresented" (J.A. 82); and that persons "18 to 34 years old are substantially underrepresented." (J.A. 83).

This underrepresentation was due to the fact that those on the "Jury Wheel" were selected from those who actually voted in

the previous presidential election. (J.A. 83-84).

Mr. O'Reilly then testified concerning "a comparable analysis of a group of persons who were picked as either forepersons or deputy forepersons for Grand Juries in this district from 1974 to 1981." (J.A. 85-86). During this period there were fifteen Grand Juries. (J.A. 68).

Between 1974 and 1981 "There were no black forepersons." (J.A. 86) There were "no women forepersons." (J.A. 86) When the jobs of "foreperson and deputy forepersons" were combined, there was a total of "twenty-seven whites and three blacks" among the group of persons who were either foremen or deputy foremen. (J.A. 86-87). Using the census data, O'Reilly would have expected "roughly 21 whites and 9 blacks. You would have expected about three times as many

blacks." (J.A. 87).

The Court asked Mr. O'Reilly if his testimony differed in any way from his testimony in United States v. Coates. Mr. O'Reilly replied that "the foreperson information is entirely new." (J.A. 101).

On redirect examination Mr. O'Reilly emphasized his study of forepersons was entirely new, that "none of that information had been presented in the Coates case." (J.A. 108, 109).

The District Court denied the motion to dismiss the indictment because of the Coates decision. (J.A. 111) He pointed out that the Fourth Circuit "acting on the very testimony you're relying on in this case, counsel, with the absence of the testimony concerning forepersons" sustained the jury plan based on "actual voters" (J.A. 111). The District Court concluded that the addition of the

"forepersons" element makes no difference. (J.A. 113).

Hobby and Levi appealed, and their appeals were consolidated. The Court, below, per Senior Circuit Judge Haynesworth, recited that each had "sought dismissal of the indictment on the basis of alleged discrimination in the selection of grand jury foreman in the Eastern District of North Carolina." 704 F2d 466 at 470, P.A. 13-14. The Court below did not dispute the evidence that "in the years 1974-1981 no Black had served as foreman of the grand jury in that district, and no woman." 702 F2d at 470, T.A. 13-14. The Court simply held that racial (and sexual) discrimination by federal judges in the appointment of grand jury forepersons is immaterial as a matter of law. The Court concluded its discussion on this point as follows:

The foreman of a federal grand jury is selected after the grand jury has been impaneled from among those who have been impaneled. His only duties are ministerial. He has no special powers or duties, beyond those borne by every grand juror, that meaningfully affect the rights of persons charged with crime. The failure of a federal grand jury foreman to carry out those ministerial duties placed upon him by F.R.Cr.P. 6(c) generally will not invalidate an indictment. See, e.g., Frisbie v. United States, 157 U.S. 160, 15 S.Ct. 586, 39 L.Ed. 657 (1895).

"The impact of the federal grand jury foreman, as distinguished from that of any other grand juror, upon the criminal justice system and the rights of persons charged with crime is minimal and incidental at best. Any suspicion that his office may enlarge his capacity to influence other grand jurors is too vague and uncertain to warrant dismissal of indictments and reversals of convictions.

The roles of grand jury foremen in the federal system differ substantially from the roles of grand jury foremen in Tennessee and other states. Federal grand jury foremen are without the significant powers authorized for Tennessee grand jury foremen. Their role is so

little different from that of any other grand juror that the rights of defendants are adequately protected by assurance that the composition of the grand jury as a whole cannot be the product of discriminatory selection.

We respectfully disagree with the contrary conclusion of the Eleventh Circuit in Perez-Hernandez."

702 F2d at 470-471, T.A. 17-18.

SUMMARY OF ARGUMENT

This case brings to the Court a situation wherein for a seven year period from 1974 through 1981, the judges of the United States District Court for the Eastern District of North Carolina appointed only white males as forepersons of the fifteen Grand Juries which served during that period.

The Court of Appeals found no fault with the exclusion of blacks and women from the leadership roles on the grand juries. Referring to Federal Rule of Criminal Procedure 6(c), the Court concluded that the duties of the foreperson are "ministerial" only, and that the "impact of the federal grand jury foreman", as distinguished from that of any other grand juror, "upon the criminal justice system and the rights of persons charged with crime is minimal and incidental at best."

The Court further concluded that the "roles of the grand jury foreman in the federal system" differ substantially "from the roles of the grand jury foremen in Tennessee and other states." The Court below thereby purported to distinguish this case from Rose v. Mitchell, 443 U.S. 545 (1979) (the Tennessee Judges there appointed only white males as foremen of Tennessee grand juries).

In Part I of this brief, the Petitioner demonstrates that the duties of the foreperson of the federal grand jury is far more than "ministerial", and that his authority and influence (and consequent impact upon the criminal justice system) far transcends that of the other jurors.

Going beyond the surface of Federal Rule of Criminal Procedure 6(c), examination of the Handbook For Federal Grand Jurors and the Model Charge to Grand Jurors discloses at least eight

significant functions imposed upon the foreperson. Many more, of an informal nature, are set forth in the opinions of the federal Courts of Appeals. Moreover, the twenty or so Federal District Court Judges who have appointed forepersons to head the federal grand juries testify to the importance of the position when they explain that they seek out for this post jurors with education, business experience, leadership ability; someone in brief who can hold the other jurors together, someone who can stand firm against the pressures of the prosecuting attorney. Petitioner, then, sets forth the expert testimony of the social psychiatrists in the cases, who vouch that the juror selected in open court by the federal judge to preside over the others thereby gains instant authority; authority augmented as the foreperson performs his ex officio roles. Finally, Petitioner

surveys the literature of the social psychologists whose studies fully support the conclusions of the expert trial testimony. In short, Petitioner demonstrates in Part I that the foreperson plays a significant, even a dominant role, in the proceedings and deliberations of the federal grand jury. In Part II of the brief petitioner demonstrates that the systematic and sustained exclusion of blacks and women from leadership positions on the federal grand jury is a constitutional wrong as a matter of law, regardless of any individual prejudice or harm.

Reference is first made by way of analogy to the state cases arising under the Equal Protection Clause of the Fourteenth Amendment, and more recently under the Sixth Amendment as carried over to the state by the Fourteenth. These cases span a century of legal experience,

and establish from the first that the criminal defendant, indicted by a grand jury from which a distinct class of persons is systematically excluded, without heavy justification, is entitled to have his case considered a second time before a grand jury which suffers no such taint. The unbroken line of cases establish that the convicted defendant need demonstrate no particularized harm, for: "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." Smith v. State of Texas, 311 U.S. 128, 130

(1941).

Turning next to the federal cases decided under the "supervisory" power of this Court, we find that the learning of the state cases is repeated, but in even stronger language. See, e.g., Glasser v. United States, 315 U.S. 60 (1942); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), and Ballard v. United States, 329 U.S. 187 (1946). Thus in Ballard, the court concluded that "reversible error does not depend on a showing of prejudice in an individual case," for "the injury is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." 329 U.S. at 195.

In Part III of the brief Petitioner adverts to the history of the Grand Jury and its evolution as a body to provide

"primary security for the innocent against hasty, malicious, and oppressive prosecution," Wood v. Georgia, 370 U.S. 375, 390 (1962).

Petitioner also points out that the Grand Jury may be used for ill as for good. Respected and responsible commentators have questioned the value of the grand jury as presently constituted. It has been abolished in England, with few to mourn its demise. Even the Model Charge to the Grand Jurors recognizes that the institution of the Grand Jury has been criticized for "allegedly acting as a mere rubber stamp approving prosecutions that are brought before it by government representatives." Handbook for Federal Grand Jurors, p. 31.

Petitioner submits that if the Grand Jury is to stand as a protective bulwark between the citizen and an over-zealous prosecutor, it must represent, and be

represented by, all the people; without exclusion based on color, race, or sex at any level of participation.

THE FOREPERSON OF A FEDERAL GRAND JURY IS NOT A MERE CYPHER. HE OR SHE IS VESTED WITH SINGULAR POWER AND AUTHORITY EX OFFICIO, POWER AND AUTHORITY AUGMENTED BY APPOINTMENT IN OPEN COURT BY A FEDERAL JUDGE. IT FOLLOWS THAT THE SYSTEMATIC AND LONG CONTINUED EXCLUSION OF BLACKS AND WOMEN FROM THIS POSITION BY FEDERAL DISTRICT JUDGES CANNOT BE CONDONED.

It is undisputed that no black had been appointed by the federal judges in the Eastern District of North Carolina to serve as foreman of any of the fifteen grand juries convened during the years 1974-1981, and no women.

The Court of Appeals below held that this long continued discrimination was immaterial, because the foreperson of a federal grand jury "has no special powers beyond those borne by every grand juror that meaningfully affect the rights of persons charged with crime," and because

the impact of the federal grand jury foreman, as distinguished from that of any other grand juror, "is minimal and incidental at best." 702 F2d at 470-471.

The Court arrived at its conclusion by reference to Federal Rule of Criminal Procedure 6(c). Section 6(c) provides that the court shall appoint one of the jurors to be foreman; and th : the foreman shall have the following powers: to adminster oaths, to keep a record of the jurors' votes, and report indictments (and "no bills") to the Court. But 6(c) is only the tip of the iceberg; the grand jury foreperson exercises far more leadership than disclosed in this one brief provision of the Federal Rules.

The Handbook for Federal Grand Juries and Model Charge

The official Handbook For Federal Grand Juries, prepared by the Judicial

Conference Committee on the Operation of the Jury System; and the Model Charge, approved and recommended to the United States District Courts in 1978 by the Judicial Conference of the United States, augment the bare-bones stricture set forth in Rule 6(c). The Model Charge is attached to and begins at page 19 of the Handbook.

The Handbook provides that after the proper number of persons have been qualified as grand jurors, "the court will appoint one of them to be the foreman, or presiding officer, of the grand jury." p. 9 (emphasis supplied). Thereafter, the Handbook designates eight other leadership roles.

First, the foreperson presides, with all the power that goes with the gavel. Handbook, p. 9.

Second, the foreperson must be notified by other grand jurors if they are

unable to attend scheduled meetings. Handbook, p. 10. They are charged that "if an emergency prevents your personal attendance at a meeting, you must promptly advise the grand jury foreperson who has the authority to excuse you from attendance." Handbook, p. 25 (emphasis supplied)

Third, the foreperson administers the oath to the witnesses as they appear. Handbook, p. 11. Thus, he has custody of the bible; and is authorized to proceed by way of affirmation when appropriate.

Fourth, the foreperson initiates the juror's interrogation of all witnesses. Handbook, p. 11. The jurors are charged that "Ordinarily, the United States Attorney or one of his assistants questions the witness first. Next, the foreperson questions the witness, followed by other members of the grand jury. Handbook, p. 26.

Fifth, the foreperson determines the need for an interpreter. Grand Jury proceedings are secret, with only the jury, the United States Attorney or his assistant, the witness under examination, and the court reporter in attendance. An interpreter may be brought in but only "if the foreperson determines one is required." Handbook, p. 11.

Sixth, after all witnesses are heard, the foreperson initiates the critical deliberations and votes. Handbook, p. 13. The jury is charged that "after all persons other than the grand jury members have left the room, the foreperson will ask the grand jury members to discuss and vote upon the question..." Handbook, p. 29.

Seventh, the foreperson keeps a tally of all votes, communicates with the Court in this regard, and is authorized to deputize others for some of these tasks.

The Handbook provides that the foreperson "must keep a record of the number of jurors concurring in the finding of every indictment and file the record with the Clerk of Court." p. 23. The grand jury is charged that the foreperson shall designate another juror to serve as secretary, and the latter shall keep a record of the number of jurors concurring in the finding of every indictment." Handbook, p. 30.

Eighth, the foreperson is the chief clerk and official communicator with the Court. He or she must sign and endorse all true bills "found with the concurrence of at least 12 grand jurors" whether the foreperson voted for or against the finding of the indictment. If the jury votes not to indict an individual who either is in jail or out on bail, the foreperson must immediately so report to the Court, "so that he may be promptly

released." Handbook, pp. 13, 30-31.

Finally, the foreperson is charged with the "security function" of collecting and keeping any notes made by the other grand jurors.

In sum, under the Handbook and Model Charge, the foreperson is the chair, or presiding officer, responsible for the entire conduct of the investigation. He or she excuses other members in emergency situtations, assures the presence of a quorum, excludes the unauthorized, initiates and guides the critical deliberations. The foreperson takes the votes, signs the official documents, administers the oaths, and responds for the others in open court.

These are the formal obligations and responsibilities set forth in the official Handbook for Federal Grand Jurors and Model Charge. But there are obligations and responsibilities of a less formal

nature. Some of them are identified in United States v. Cross, 708 F2d 631 at 637 (11th Cir. 1983):

> "For example, the foreperson decides when to contact the district judge, and the foreperson consults with the judge outside the presence of the grand jury. Communications between the United States Attorney's office and the grand jury are through the foreperson. The foreperson decides when to convene and recess the grand jury. The foreperson, acting alone, may excuse grand jurors on a temporary basis. The foreperson may decide the order in which witnesses are called. The foreperson maintains order in the grand jury. The foreperson helps the United States Attorney decide whether to initiate contempt proceedings against recalcitrant witnesses. And according to an offer of proof made by Cross in the trial court, Assistant United States Attorneys were even prepared to testify that on occasion they had sought grand jury subpoena approval from the foreperson acting alone without the consent of the entire grand jury. These duties and responsibilties, and numerous others, considered in isolation, may under certain circumstances seem "ministerial." However, the overall extent and nature of the

> foreperson's responsibility for the very functioning of the grand jury should not permit the conclusion that the position is constitutionally insignificant.

The Court added in the footnote that:

> 7. The record in this appeal includes correspondence between a grand jury foreperson and District Judge Owens which reflects a substantial role on the part of the foreperson and in determining the grand jury's schedule.

No mere cypher, the foreperson. He or she is "primus inter pares" with the other members of the grand jury in the same sense that University Presidents are sometimes described as "first amongst equals" with the University professors. It just is not so.

Statements of the Federal Judges Responsible for the Appointment of Forepersons.

The federal judges who appoint the grand jury forepersons know that their function is not "minimal and incidental

at best." They appreciate the special powers or duties of those who preside over grand jury sessions, and try to appoint persons capable of the task. If the duties of the forepersons were purely ministerial, a person with clerical experience would suffice. But the judges look for far more than that. Almost uniformly they select as forepersons those with good management skills, strong occupational experience, the ability to preside, good educational background, personal leadership qualities; and someone who "can not easily be led by the United States Attorney." United States v. Cross, 708 F2d 631, 636 (11th Cir. 1983).

The District Court Judges have been called to testify about their appointments in a number of cases: two United States District Judges for the District of South Carolina (Charleston Division) in United States v. Manbeck, 514 F. Supp. 141 at 150

(D. S.Car. 1981); eight United States District Judges for the Northern District of Georgia in United States v. Northside Rlty. Assoc., 510 F. Supp. 668 at 683-684 (N.D. Ga. 1981); two Judges in the Northern District of Florida in United States v. Holman, 510 F. Supp. 1175 (N.D. Fla. 1981); eight judges for the Southern District of Florida in United States v. Jenison, 485 F. Supp. 655, 665-666 (S.D. Fla. 1979); nine judges in the Northern District of Georgia in United States v. Breland, 522 F. Supp. 468 at 471-474 (N.D. Ga. 1981).

The testimony of these twenty or so judges run a pattern. They take the responsibility of appointing a grand jury foreperson with great concern. Typically, they will review the information provided in the jury questionnaires, observe the appearance and speaking voice of the

various jurors during the impaneling, and make a selection based on the criteria summarized above by the Court in United States v. Cross.

Since the factors which each judge considers are somewhat individualized, a few representative statements are set forth below to give some flavor of the appointment process in actual operation. The testimony below is selected from that of the nine judges in Breland, but is similar to that by the other judge in the other cases.

> Judge Robert L. Vining, testified that, based on his personal observations of 40 state grand juries while he was district attorney in the Georgia state courts, the foreperson occupies a "vital position" -- "[o]therwise you've got twenty-three people running off in twenty-three different directions." Judge Vining described desirable qualities in a foreperson as follows:
>
> > [H]e or she has to be a person who basically can operate, run a business, a

board, so as to speak, of a business, with some degree of firmness, not be arbitrary. I think a foreman has to be a strong person in that it is--the grand jury is dealing with the government and, after all, the grand jury is the only thing that stands between a defendant and trial.

Judge Richard C. Freeman, a ten-year veteran on the bench, was interested first in a person's education and next in the job position. His reasoning was as follows:

> I think that the person who functions as the grand jury foreperson needs to have some sort of ability to lead and to make decisions, and I think the more education a person has--and that doesn't make him any brighter than anybody else, doesn't make him any more intelligent, but it means that he has pursued a course in life that perhaps might equip him better, or her better, to do a particular function such as this.
>
> In the absence of any outstanding educational background, I would then look to present job position.

Judge Newell Edenfield, for 14 years a member of the court, considered each questionnaire,

making several tentative choices before reaching a final decision. He was concerned with the education and employment of the grand jurors in selecting forepersons and deputies. Age was also a factor, since he did not ordinarily appoint someone of extreme old age or extreme youth, but was seeking "level headed" persons. Judge Edenfield stated that he would be a "little suspicious" of appointing as foreperson someone who indicated as employment "housewife" even if she was educationally qualified "[b]ecause [he] wouldn't think [such person] would have the necessary knowledge of the dealings in the community dealing with the various problems that come up in the business world, the commercial world, social world. That is, it's not likely they would."

Judge William C. O'Kelley, a district judge since 1970, first reviewed every juror questionnaire to look for education and employment. He then observed prospective grand jurors in the courtroom as they were identified and answered the roll call to determine "whether they were forceful," and he chose "a person who [he] considered to be a good presiding officer." He thought the foreperson and deputy should have "a substantial educational background and ... employment

> background that [indicated] some managerial ability." Judge O'Kelley stressed that he usually had several possible choices in mind and made his final decision after hearing them respond. On cross-examination, the judge expressed the view that a "good presiding officer" was one: who can handle ... and control people and control meetings, maintain order."
>
> Chief Judge Charles A. Moye, Jr., similarly considered the education and experience of prospective grand jurors in selecting forepersons and deputies. He attempted to select as foreperson "the person that appeared ... strongest in administrative or leadership ability. And the deputy would ... be the second person." It was Judge Moye's practice to tentatively select four names from the list before entering the courtroom and then make final decision after acting upon requests for excuse.

Why would these judges give this time and consideration to the appointment of grand jury forepersons if they have "no special powers"? Obviously, the judges with the responsibility for appointment, those on the firing line, so to speak, do

not believe the position is to be so denigrated. They believe, obviously, that the duties of the forepersons are not merely "ministerial". They believe, obviously, that there are special powers or duties in the foreperson far beyond that borne by the other jurors.

The Theoretical Evidence; Testimony of the Social Psychiatrists

In three cases, there was "theoretical" testimony concerning the significance of the role played by the foreperson of the grand jury. United States v. Musto, 540 F. Supp. 346, 359-360 (D. N. Jersey 1982); United States v. Northside Rlty. Assoc., 510 F. Supp. 668, 683 (N.D. Ga., 1981); and United States v. Breland, 522 F. Supp. 468, 471 (N.D. Ga. 1981).

Dr. John McConahay, an expert in group dynamics at Duke University,

testified in all three cases that the appointment of the foreperson by the judge in the presence of the other jurors conferred upon the foreperson certain power and influence not held by other jurors. The court in Musto summarized the testimony in condensed form as follows:

> "In support of this theory, defendants adduced testimony of social psychologists, who testified that the foreperson is perceived by other jurors as having special influence. This influence derives from several bases of social power identified by social psychologists. The types of power include: legitimate power, through which the person within the group grants the leader the right to influence him or her; expert power, through which the leader is seen to have special knowledge; information power, through which the leader is seen as having special information about the specific case; and coercive power, through which the leader has control of reward and punishment for the group and its members.
>
> Dr. John McConahay, a social psychologist, testified that when the judge, who is viewed by the court as being neutral,

knowledgeable in the law, fair, and just, chooses a foreperson in the presence of other jurors, he confers upon the person selected legitimacy. The foreperson's legitimate power is then enhanced by his performing purely ministerial acts, such as administering oaths and signing indictments. This legitimate power of the foreperson, it is contended, also results in the attribution to him of other bases of social power. For example, other members of the jury may perceive that the foreperson is an expert because he is selected by another perceived expert, the judge.

540 F. Supp. 346 at 359-360.

In Northside Realty Assoc., Dr. McConahay testified that:

"the influence of an imposed leader, as one appointed by a judge to be a grand jury foreperson, is apt to be greater than that of other members of the grand jury. Since the foreperson might be perceived as having more expertise if chosen by a judge, he opined that a judge-appointed foreperson would likely exercise considerable influence over the grand jury's deliberations. 510 F. Supp. 668 at 683.

Professor Hans Zeisel, author of The

American Jury, testified in the Breland case regarding the role of the foreperson in petit juries. His studies indicate that the role of the foreperson is "dominant" in that the foreperson contributed 25% of the comments during the jury deliberations; and "persuasive" in that the foreperson's initial feeling concerning a case coincided with the jury's ultimate finding in more cases than did the initial feelings of other jurors. Professor Zeisel agreed with Dr. McConahay that the influence of a foreperson would be increased if appointed by a judge, and that the leader of any group becomes more important as the size of the group increases. 522 F. Supp. 468 at 471.

The McConahay/Zeisel testimony has full support in the literature of social psychology.

Dr. A. Paul Hare in his Handbook of Small Group Research (The Free Press, a

division of Macmillan Publishing, 1962) tested the interaction in four different permanent and temporary groups and concluded that "individuals with high formal rank in a group will have more influence on a group decision than those with low rank." p. 141. A study of "power and influence" in controlled groups of various sorts, led to these conclusions:

> "The influence of a member in the informal structure will be enhanced if he is placed in a formal position of leadership."
>
> "An individual will try to exert more influence if he is placed in the leader role."
>
> "Whether the power of a person is based on legitimacy, ability to coordinate group activity, or some other factor, the more he attempts to influence another person, the more he will be successful."
>
> "Subjects will pay more attention and respond more favorably to persons of high power than to persons of low power." pp. 284-285

Dr. Terence K. Hopkins in The Exercise of Influence in Small Groups (The Bedminster Press, 1964) elaborates on fifteen basic propositions. One of them is that "For any member of a small group, the higher his rank, the greater his influence." p. 86 ff. For similar conclusions, see Paul V. Crosbie, Interaction in Small Groups (Macmillan Publishing Co., 1975) at 351; and H. L. Nixon II, The Small Group (Prentice-Hall, Inc. 1979), pp. 188-189.

F. Strodtbeck, R. James and Charles Hawkins' studies on the Social Status in Jury Deliberations, is included in a volume on Interpersonal Behavior In Small Groups (Prentice-Hall, Inc. 1973), edited by R. Ofshe. They studied the participation in group discussion by different jurors, and concluded that "the foreman was responsible for approximately

one-fourth of the total acts.* The "latent premise in the study of participation" was that "high participation" indicates greater ability to influence others. This was supported by the study.

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* Immediately prior to trial in this case, the Government made available to the Petitioner the grand jury testimony of those it intended to call as witnesses. An examination of these transcripts supports the experiments of the social psychiatrists. On the first day of the grand jury, Oct. 28, 1980, it heard testimony from witnesses Ken Durham, Benjamin Carraway, and R. D. Locklear. Eight grand jurors asked Ken Durham a total of 45 questions, with the foreman asking 14. Benjamin Carraway was asked eight questions, all by the foreman. R. D. Locklear was asked 26 questions by five different jurors, 6 by the foreman. In total, 79 questions were asked on the first day, with the foreman asking 28. Juror #11 was next in the number of questions asked, with 15.

It is notable that during the testimony of the first witness Ken Durham, the foreman interrupted the questioning by the U.S. Attorney with questions of his own (p. 14 of the transcript), and on another occasion suggested to Juror #11 that he "hold his question for one of the people from the department of Natural Resources." (p. 56 of transcript).

The voluminous grand jury transcripts were not made part of the record.

> "Jurors were asked before the deliberation what, if anything, they would award the plaintiff. A detailed examination of predeliberation awards of the individual juror with the subsequent group awards in 29 deliberations reveals that the more active jurors, shifted their predeliberation positions less than less active jurors, in the process of agreeing with the group verdict." at pp. 188-189.

Thus, once one goes beyond the surface of Rule 6(c); and looks at the duties set forth in the official Handbook for Federal Grand Jurors and Model Charge, listens as the Courts explain the unofficial obligation, heeds the testimony of numerous federal judges concerning the basis for their foreperson appointments, and examines the evidence and literature of the social psychologists, it becomes indisputable that the authority of the foreperson is not "minimal and incidental" as claimed by the Court below. To the contrary, the foreperson of the federal

grand jury has special powers far beyond those borne by the other grand jurors, and these powers meaningfully affect the rights of persons charged with crime.

But even if this were not so, regardless of whatever importance adheres to the office of grand jury foreperson, this Court cannot countenance racial and sexual discrimination in the appointment to that office. As this Court recently held in Rose v. Mitchell, 443 U.S. 545 (1979), such discrimination "is especially pernicious in the administration of justice" 443 U.S. at 555, and constitutes reversible error without showing of individual harm. For over 100 years, this court has echoed the refrain spelled out in Ballard v. United States, 329 U.S. 187 (1946): "The injury is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, and to the

democratic ideal reflected in the processes of our courts." 329 U.S. at 195.

We next turn to this history.

II

REGARDLESS OF PREJUDICE, THE UNBROKEN PRACTICE OF THIS COURT FOR OVER ONE HUNDRED YEARS HAS BEEN TO REVERSE CRIMINAL CONVICTIONS WHEN THE INDICTING GRAND JURY IS CONSTITUTIONALLY TAINTED AS HERE, BY THE UNLAWFUL EXCLUSION OF SIGNIFICANT COMMUNITY GROUPS.

Petitioner has demonstrated in Part I of the brief that the foreperson plays a significant role in deliberations and other functions of a federal grand jury; far above the role played by the other individual members. It follows that the sustained and purposeful exclusion of blacks and women from this appointed leadership post requires the reversal of any conviction resulting from an indictment by a grand jury so tainted.

In this section of the brief, Petitioner will demonstrate that the exclusion of black and women, qua

exclusion alone, requires the reversal of the conviction.

In Rose v. Mitchell, the Court summarized a century of litigation in this area of the law and concluded as follows:

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. As this Court repeatedly has emphasized, such discrimination "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." Smith v. Texas, 311 U.S. 128, 130 (1940) (footnote omitted). The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as

defendant--there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." Ballard v. United States, 329 U.S. 187, 195 (1946).

Because discrimination on the basis of race in the selection of members of a grand jury thus strikes at the fundamental values of our judicial system and our society as a whole, the Court has recognized that a criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded. E.g., Neal v. Delaware, 103 U.S., at 394; Reece v. Georgia, 350 U.S., at 87. For this reason, the Court also has reversed the conviction and ordered the indictment quashed in such cases without inquiry into whether the defendant was prejudiced in fact by the discrimination at the grand jury stage. Since the beginning, the Court has held that where discrimination in violation of the Fourteenth Amendment is proved, "'[t]he court will correct the wrong,

> will quash the indictment [,] or the panel [;] or, if not, the error will be corrected in a superior court,' and ultimately in this court upon review," and all without regard to prejudice. Neal v. Delaware, 103 U.S., at 394, quoting Virginia v. Rives, 100 U.S. 313, 322 (1880).
>
> 443 U.S. at 555-556

Rose v. Mitchell originated in the state courts and arises under the Equal Protection Clause of the Fourteenth Amendment. Nonetheless, a brief review of the cases decided under the Fourteenth Amendment is appropriate, as those cases set the tone when this Court reviews similar situations originating in the federal courts and arising under its supervisory powers.

If it is unlawful under the Fourteenth Amendment for state court judges to appoint only white males to serve as forepersons of state grand juries, it would appear a fortiorari

that this Court would not condone the appointment of only white males by federal judges to serve as forepersons of federal grand juries. On this supposition, we will briefly trace the developments of the "state cases", and then discuss the "federal cases" decided under this Court's supervisory power.

The State Originated Cases
Decided Under The
Fourteenth Amendement

The civil rights litigation concerning grand juries began more than one hundred years ago with Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1880); and Ex Parte Virginia, 100 U.S. 339 (1880).

Strauder was a black man, indicted by a West Virginia grand jury from which black men were excluded by express provision of a West Virginia statute.

The Court held that the fact this exclusion because of race was in violation of the Fourteenth Amendment "ought not to be doubted." The Court wrote as follows:

> "Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. And how can it be maintained that compelling a

> colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

Strauder v. West Virginia, 100 U.S. at 308-309. The remedy was to remove the case to the federal courts where it could be begun all over again before a grand jury free from racial taint. 100 U.S. at 312.

Virginia v. Rives, 100 U.S. 313 (1880) also involved a black man indicted for murder by a grand jury selected from a venire composed "entirely of the white race." The exclusion of blacks, unlike the situation in West Virginia, was not pursuant to the mandate of state statute. Therefore, this Court held that removal to the federal system was

not proper; that the defendant should seek redress within the state system where the Virginia courts could "correct the wrong", "quash the indictment." The court summarized as follows:

> If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason,--it can with no propriety be said the defendant's right is denied by the State and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court.

100 U.S. at 322.

Ex Parte Virginia, 100 U.S. 339 is the third of the 1880 trilogy. There, a state judge "excluded and failed to select" for the grand and petit jury "citizens of African race and black color." He was indicted under the Civil Rights Act of 1875, and filed this suit for habeas corpus. The Court denied the writ because section 1 of the Fourteenth Amendment secures

> "to colored men, when charged with criminal offenses against a state, an impartial jury trial by jurors indifferently selected or chosen without discrimination against such jurors because of their color";

And because section 5 of the Fourteenth Amendment empowers Congress to enforce this right by means of a criminal indictment.* 100 U.S. at 354.

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* Ex Parte Virginia is a rare example of an attempt to secure immunity from racial discrimination in jury selection by way of criminal
(footnote continued on the next page)

Neal v. Delaware, 103 U.S. 370 (1881) was next in the line of grand jury cases to reach this court. Neal was indicted for the crime of rape. He moved to quash the indictment because the court "in selecting persons to serve as grand jurors . . . . selected no persons of color or African race to serve as such jurors." 103 U.S. at 374.

This Court per Mr. Justice Harlan, held it was error not to quash the indictment. The facts of record were that "no colored citizen had ever been summoned as a juror in the courts of the State--although its colored population . . . exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand." This was a prima facie case of a denial

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sanctions. The almost universal remedy is that set forth in Virginia v. Rives, i.e., to quash the indictment and start all over again.

"of that equality of protection which has been secured by the Constitution." Moreover, the judgment of the Delaware officials that the black race in Delaware was utterly disqualified to sit on juries "by want of intelligence, experience, or moral integrity" was declared by this court to be "a violent presumption", which could not be accepted. 103 U.S. at 397. The Court held that the motion to quash must be granted, otherwise as it said in closing, "the constitutional prohibition has no meaning." 103 U.S. 397.

These four early cases set the precedent for the intervening century of litigation under the Equal Protection Clause of the Fourteenth Amendment.

Not once has the Court wavered from its 1880 holdings that "it is a denial of the equal protection of the laws to try a defendant of a particular race or

color under an indictment issued by a grand jury . . . from which all persons of his race or color have, solely because of that race or color, been excluded by the state." Hernandez v. Texas, 347 U.S. 475 at 477 (1954).

Not once has the Court departed from its holding in Virginia v. Rives that the appropriate remedy when fault is found is to quash the indictment. To the contrary, the necessity of this remedy has been reaffirmed on the few infrequent occasions when it has been called into question. See, e.g., Pierre v. State of Louisiana, 306 U.S. 354 (1939); Cassell v. Texas, 339 U.S. 282 (1950); Rose v. Mitchell, 443 U.S. 545 (1979)*.

*In Pierre, the state trial judge ruled that a tainted grand jury makes no difference, as it only presents indictments. The state judge below recognized that the petit jury, which (footnote continued on the next page)

Not once has this Court deviated from its holding in Neal v. Delaware that a prima facie case of discrimination may be established by statistics. This is now known as the "rule of exclusion" described in Castandeda v. Partida, 430 U.S. 482, 494-495 (1977) as follows:

> "in order to show that an equal protection violation has occurred in the context of

decides guilt or innocence, must be free from taint

In Cassell, Mr. Justice Jackson voiced a lone objection by arguing that federal courts should not set aside criminal convictins solely on the ground that discrimination occurred in the selection of the grand jury, so long as no constitutional impropriety tainted the selection of the petit jury, and guilt was established beyond reasonable doubt at a trial free from constitutional error.

In Rose, Mr. Justice Stewart raised the same issue, and concluded that "the time has come to acknowledge that Mr. Justice Jackson's question is unanswerable, and to hold that a defendant may not rely on a claim of grand jury discrimination to overturn an otherwise valid conviction." 443 U.S. at 574-575. Mr. Justice Rehnquist joined in this opinion.

grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable distinct class, singled out for different treatment under the laws, as written or as applied. Hernandez v. Texas, 347 US, at 478-479, 98 L Ed 866, 74 S Ct 667. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. Id., at 480, 98 L Ed 866, 74 S Ct 667. See Norris v. Alabama, 294 US 587, 79 L Ed 1074, 55 S Ct 579 (1935). This method of proof, sometimes called the "rule of exclusion," has been held to be available as a method of proving discrimination in jury selection against a delineated class. Hernandez v. Texas, 347 US, at 480, 98 L Ed 866, 74 S Ct 667. Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. Washington v. Davis, 426 US, at 241, 48 L Ed 2d 597, 96 S Ct 2040; Alexander v.

> Once the defendant has shown substantial under-representation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case."

Finally, as in Neal v. Delaware, it remains a "violent presumption" that all members of a group may be disqualified "by want of intelligence, experience or moral integirty." The state may not rebut a prima facie case by reference to a "high standard qualification for jurors", or by "general assertions by officials" that they did not discriminate on the basis of race. Norris v. Alabama, 294 U.S. 587, 593, 598-599 (1935). With a large number of blacks from which to choose, there "is no room for inference" that there are not among them qualified jurors who meet the test "of good moral character, who

can read and write." Hill v. Texas, 316 U.S. 400, 403 (1942). See also Eubanks v. Louisiana, 356 U.S. 584, 587 (1958); Turner v. Fouche, 396 U.S. 246, 361 (1970).

The State Originated Cases Decided Under the Requirement of the Sixth and Fourteenth Amendments That There Be a "Fair Cross Section."

The "Equal Protection" cases discussed above were assumed to include a "same class" rule, i.e., that the defendant must be a member of the excluded class. On this theory, prejudice could be presumed. In recent years, since the 1968 decision in Duncan v. Louisiana, 391 U.S. 145 that the Sixth Amendment right to a jury trial is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, the Court has required a "fair cross section",

regardless of the "same class rule", regardless of actual prejudice.

This development was presaged by Peters v. Kiff, 407 U.S. 493 (1972). Peters, convicted of burglary in the state courts of Georgia, prior to the decision in Duncan, filed a petition in habeas corpus in the federal courts on the allegation that "Negroes were systematically excluded from the grand jury that indicted him." The Court of Appeals affirmed the denial of the petition because Peters "is not himself a Negro." 407 U.S. at 494. This Court reversed because

> "whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law. This certainly is true in this case, where the claim is that Negroes were systematically excluded from jury service."

The Court was unwilling to assume that the "exclusion of Negroes has relevance only for issues involving race" for

> "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."

407 U.S. at 503, 504.*

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* The opinion of the Court was by Mr. Justice Marshall. Mr. Justice Douglas and Mr. Justice Stewart joined the opinion.

Mr. Justice White joined by Mr. Justice Brennan and Mr. Justice Powell concurred in the judgment because since March 1, 1875 the criminal laws of the United States have contained a proscription against the disqualification of any citizen from service as a grand or petit juror "on account of race, color, or previous

(footnote continued on the next page)

Peters v. Kiff was a pre Duncan decision, for all practical purposes. After this Court extended the Sixth Amendment right to trial by jury to the States, there were new explorations of what is required in a trial by jury.

Taylor v. Louisiana, 419 U.S. 522 (1975) was the first case to examine the

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condition of servitude." Mr. Justice White would implement

> "the strong statutory policy of § 243, which reflects the central concern of the Fourteenth Amendment with racial discrimination, by permitting petitioner to challenge his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him. This is the better view, and it is time that we now recognized it in this case and as the standard governing criminal proceedings instituted hereafter."

407 U.S. at 507

Mr. Chief Justice Burger, with whom Mr. Justice Blackman and Mr. Justice Rehnquist joined, dissented because there was no "demonstration of prejudice, or basis for presuming prejudice, to the accused." 407 U.S. at 508.

issue. There, women were excluded from jury service in Lousiana unless they "opted in", i.e. unless they filed a written declaration of a desire to be called for jury duty. Few women did, "grossly disproportionate to the number of eligible women in the community."

Billy J. Taylor was indicted for kidnapping, and moved to quash the vanire because of the systematic exclusion of women. His motion to quash was denied, and he appealed.

This Court, per Mr. Justice White, first responded as follows, to the state insistence that Taylor, a male, has no standing to object to the exclusion of women:

> But Taylor's claim is that he was constitutionally entitled to a jury drawn from a venire constituting a fair cross section of the community and that the jury that tried him was not such a jury by reason of the exclusion of women. Taylor was not a member of the

> excluded class; but there is no rule that claims such as Taylor presents may be made only by those defendants who are members of the group excluded form jury service."

The Court cited and relied upon Peters v. Kiff.

The Court then turned to the merits and held that a "fair cross section" requirement is fundamental to the jury trial guaranteed by the Sixth Amendment. The Court explained:

> The purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. Duncan v. Louisiana, 391 US, at 155-156, 20 L Ed 2d 491, 88 S Ct 1444. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only

> consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

419 U.S. at 530.

The Court was further persuaded that the fair cross-section requirement is violated by the systematic exclusion of women.

Taylor concerned a situation where the women in Louisiana could "opt in" for jury duty. Duren v. Missouri, 439 U.S. 357 (1979) involved a system wherein women, once called for jury duty, could "opt out". Each system resulted in the exclusion of a disproportionate number of women, each was held to violate the concept of a jury drawn from a fair cross section of

the community.

The Court held that Duren, a man, established a prima facie violation of the fair cross-section requirement when he showed (1) that the group alleged to be excluded is a "distinctive" group in the community (women make up a distinctive group); (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community (women composed 53% of the community, 15% of the jury venires); and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process (the option to "opt out"). 439 U.S. at 364.

The burden then shifts to the state to demonstrate "a significant state interest"; because "the right to a proper jury cannot be overcome on merely

rational grounds." 439 U.S. 367. The Court concluded that the fact that some women might have "preclusive domestic responsibilities" did not justify their disproportionate exclusion on jury venires. 439 U.S. at 369.

The Cases Decided Under the Supervisory Power of this Court: Glasser, Thiel, and Ballard.

This Court has decided three cases under its supervisory power which clearly establish that in the federal judiciary system there is no room for prejudice against any group, no matter who might raise the issue.

Glasser v. United States, 315 U.S. 60 (1942) is the first of these cases. Glasser was an assistant United States Attorney in Chicago, assigned to the prosecution of liquor cases. He was indicted for conspiring with others to defraud the United States, in effect, by

taking bribes to ease up on prosecutions against those who gave the bribes. His contention on appeal was that he had been denied an impartial trial because of the exclusion from the petit jury of all women not members of the Illinois League of Women Voters. The Court, per Mr. Justice Murphy, fully addressed this issue, although it held that the allegation was not sustained by proof.

The Court first noted that trial by jury has been "a prized shield against oppression", the "glory of the English law", a constitutional right "in criminal proceedings in a federal court." 315 U.S. at 84. Further, lest the right to trial by jury be nullified "by improper constitution of juries," our notions of what a proper jury is "have developed in harmony with our basic concepts of a democratic society and a representative government." 315

U.S. at 85.

Turning to the vice of restricting women jurors to those who are members of the League of Women Voters, the Court noted that the officials charged with the selection of federal jurors may "exercise some discretion to the end that competent jurors may be called," but, they:

> "must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties."

315 U.S. at 86.

Thiel v. Southern Pacific, Co., 328 U.S. 217 (1946) is the second in the trilogy of federal cases. Thiel was a suit for personal injury in the federal court based on diversity of citizenship. Thiel objected to the entire jury panel, because the clerk of court and the jury commission deliberately and intentionally excluded from the jury list all persons who work for a daily wage.

This Court, per Mr. Justice Murphy, ruled that the motion to strike the jury panel should have been granted, because the "American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." Moreover, "recognition must be given to the fact that those eligible

for jury service are to be found in every stratum of society." Jury competence "is an individual rather than a group or class matter" and that fact "lies at the very heart of the jury system." 328 U.S. at 220.

The Court concluded that it could not sanction "the method by which the jury panel was formed in this case" and it was therefore required "to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the federal courts. See McNabb v. United States, 318 U.S. 332, 340." On this basis,

> "it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class." 328 U.S. at 225

Ballard v. United States, 329 U.S. 187 completes the trilogy. Mrs. Ballard was indicted and convicted of mail

fraud. Women were intentionally and systematically excluded from the grand jury which indicted her, from the petit jury which convicted her. Ballard moved to quash the indictment; she challenged the array of the petit jurors. Both motions were denied. The Court, per Mr. Justice Douglas, held this was error.

The Court rejected the contention that Mrs. Ballard suffered no prejudice because "an all male panel drawn from the various groups within a community will be as truly representative as if women were included." The Court pointed out that "the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference.

Yet a flavor, a distinct quality is lost if either sex is excluded." 329 U.S. at 193-194.

The Court assumed the woman defendant could or might be prejudiced by the absence of women from the juries, but concluded that:

> "reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of prescribed standards of jury selection . . . . The injury is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, to the democratic ideal reflected in the processes of our courts." 329 U.S. at 195.

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This brief survey of the equal protection cases under the Fourteenth Amendment; the fair cross-section cases under the Sixth and Fourteenth Amendment; the exclusion cases under

this Court's supervisory power makes one thing abundantly clear: prejudice to the defendant, to the jury system, to the democratic process itself is inevitable whenever those responsible for the selection of jury panels begin to pick and choose on the basis of race, of gender, of class or caste.

It follows that the exclusive selection of white males to chair the fifteen grand juries in the Eastern District of North Carolina requires that the indictment in this case be quashed, and that proceedings begin anew without the taint of racial and sexual discrimination.

III

A Prime Purpose of the Grand Jury, To Serve As A Bulwark Standing Solidly Between the Citizen And An Overzealous Prosecutor, Will Be Enhanced By Broader Community Participation At Every Level

In Part I of this brief Petitioner demonstrates that the foreperson of the grand jury makes a difference, that he or she plays a leadership role which may well be decisive. It follows, petitioner contends, that this court cannot countenance a systematic exclusion from this post because of race, color or sex.

In Part II of this brief Petitioner demonstrates that any systematic exclusion of any identifiable group in the community from participation in the administration of justice at the grand jury level is wrong as a matter of law, regardless of individual prejudice.

Here, in Part III, petitioner briefly examines the history of the Grand Jury, some of the major criticisms, and urges that its historic function as a shield against unwarranted prosecution can best be preserved by ensuring a broad based participation of all community elements at every level of operation, including the top. We turn to this now.

The Grand Jury As Primary Security for The Innocent Against Hasty, Malicious, And Oppressive Prosecution

The Grand Jury has roots going back to the 1166 Assize of Clarendon. In that year, Henry II established the "Grand Assize" to help him wrest the administration of Justice from the Church and the feudal barons. M. Frankel and G. Naftalis, The Grand Jury, An Institution on Trial (Hill and Wang,

a division of Farrar, Straus & Giroux) (1975) p. 6; H. Schwartz, Demythologizing the Grand Jury, 10 The American Criminal Law Review 701, 707 (1972).

At first, the jury both accused, and then tried the accused for his alleged crime. This continued until 1350, when Parliament forbad grand jurors from sitting in judgment of those they had indicted. Thereafter, when one of the King's traveling judges arrived to hold court, the Sheriff would select twelve persons as local petit jurors; twenty-four others, usually knights, to serve as an accusing body for the entire county. These twenty-four, after eliminating one member to preclude deadlocks, began investigating questionable incidents. It was "le grande inquest". J. Van Dyke, The Grand Jury: Representative or Elite? 28

Hastings L. Rev. 37, 38 (1976)

The early grand jury was not a protector of the people; it was an arm of the King to keep his peace. H. Schwartz Demythologizing the Grand Jury, 10 American Criminal Law Review at 710.

It was not until 1681 that the Grand Jury asserted a power to refuse to indict. In that year, in a bitter political struggle between Catholic leaning Crown and Protestant Parliament, the grand jury of London refused to indict Stephen Colledge, and then refused to indict the Earl of Shaftesbury. The grand jurors returned the bill presented by the Royal Prosecutor with the word "ignoramus"; meaning in Latin "we are ignorant", or "we ignore it." Thus began the concept of the grand jury as a protector of the people. As in the mother country,

colonial grand juries undertook to protect the individual from political oppression. The most celebrated case was that of John Peter Zenger, a New York newspaper publisher. The Royal Governor sought to have him prosecuted for criminal libel, but two different New York grand juries in 1743 refused to indict. He was then prosecuted by information--a written accusation drawn by the prosecutor.

In Boston, a grand jury refused to indict those who had led the 1765 riots against the Stamp Act. Four years later a different Boston grand jury indicted British soldiers for offenses against the populace, but refused to indict persons charged with inciting other British soldiers to desert. M. Frankel and Naftalis, The Grand Jury, An Institution on Trial, p. 11.

And it was in Boston, during the

debates on the ratification of the Constitution, that Abraham Holmes complained:

> "There is no provision made in the Constitution to prevent the Attorney General from filing information against any person whether he is indicted by the grand jury or not; in consequence of which the most innocent in the Commonwealth may be taken by virtue of a warrant issued in consequence of such information." 2 Elliot's Debates 110 (2d E. 1881), quoted in Van Dyke, The Grand Jury: Representative or Elite? 28 Hastings L. Rev. 37, 39 (1976).

The consequence of this and similar sentiment was the requirement in the Fifth Amendment that "No person shall be heard to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The grand jury "is enshrined in the Constitution" because of its traditional "high place as an instrument of justice

in our system of criminal law." United States v. Sells Engineering, Inc. ___ U.S. ___, 103 S. Ct. 3133, 3137 (June 30, 1983). Historically, it

> "has been regarded as a primary security for the innocent against hasty, malicious, and oppressive prosecution; it serves the invaluable function in our society of standing between accuser and accused, whether the latter be an individual, minority group, or whatever, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

Wood v. Georgia, 370 U.S. 375, 390 (1962).

The Darker Side of The Grand Jury As the Inquisitorial Arm of the Prosecution.

But there is another, and a darker side to the grand jury. Like its progenitor in the Twelfth Century, it remains "a grand inquest", a body with powers of both "investigation and

inquisition." Blair v. United States, 250 U.S. 273, 282 (1919) "No judge presides to monitor its proceedings", United States v. Calandra, 414 U.S. 338, 343 (1974), and it is permitted to return indictments on the basis of testimony which is "incompetent", Holt v. United States, 218 U.S. 245 (1910); or testimony which is entirely "hearsay". Costello v. United States, 350 U.S. 359, 363 (1956). The "exclusionary rule" prohibiting the use of evidence obtained in violation of the Fourth Amendement does not apply, United States v. Calandra, 414 U.S. 338 (1979); and the grand jury may base its verdicts on information obtained in violation of the Fifth Amendment privilege against self incrimination. Lawn v. United States, 355 U.S. 339 (1958). Even the First Amendment right of a newsman to shield his source of information

ordinarily must yield to the demands of the grand jury for pertinent information. Branzburg v. Hayes, 408 U.S. 665 (1972).

The grand jury, now as in the past, is employable in a partisan, political way. In early America, President Jefferson praised the grand jury as a "sacred palladium of liberty" S. Padover, The Complete Jefferson (Quincey Press, 1943) p. 121. But his administration used the grand jury as an instrument of partisan vengence against his political rival Aaron Burr. A Kentucky grand jury returned an "ignoramus". Then a Mississippi grand jury returned an "ignoramus". Finally, the Jeffersonians obtained a "true bill" from a grand jury in Virginia. After this harrassment, it seems only fitting that Burr was acquitted of all charges after trial by a petit jury. L. Clark,

The Grand Jury, The Use and Abuse of Political Power (Quadrangle, The New York Times Book Co.) p. 21.

A current complaint is that the government often manipulates the grand jury process as an extra legal device for discovery in non-criminal matters. See, e.g. United States v. Baggot, ___ U.S. ___, 103 S. Ct. 3164 (June 30, 1983).

An equally serious complaint, if not more so, is that the grand jury no longer stands as a bulwark, a shield, between the state and the hapless individual; rather it serves as an "arm of the prosecutor". Grand Jury Reform, Report of the Committee on Federal Legislation and the Committee on Civil Rights of the Association of the Bar of the City of New York (1979) p. 3. Even the Model Charge alerts the jurors to criticism that the grand jury is a "mere

rubber stamp" approving "all prosecutions brought before it by the government." Handbook For Federal Grand Juries, p. 31.

In more colorful language, Judge William Campbell, after 32 years on the Federal Bench in Chicago, complained that the grand jury "has long ceased to be the guardian of the people, for which purpose it was created at Runnymede", because

> "any experienced prosecutor will admit that he can indict anybody, at any time for almost anything before any grand jury."

Quoted by Mr. Justice Douglas dissenting in United States v. Mara, 410 U.S. 19, 23 (1973).

The short of the matter is that the Grand Jury has its distinguished detractors. After eight centuries, more or less, the grand jury was abolished by England in 1933, and replaced by a

"preliminary hearing screening process." There were few to mourn its demise. One commentator noted;

> "The grand jury has long lagged superfluous on a stage where it once played a great part.... During its last years it was kept in being only by that strong sentiment among lawyers which resents charge however salutory; but though the English people are patient there is a certain vein of common sense in its making, which in the long run prevails."

quoted in S. Dash, The Indicting Grand Jury: A Critical Stage, 10 American Criminal L. Rev. 807, 817, n. 45 (1972).

But for every detractor, there is an equally distinguished defender. Their effort lies not in the way of abolition, but in the way of reform. See generally, D. Emerson, Grand Jury Reform: A Review of Key Issues, a publication of the National Institute of Justice of the U. S. Department of

Justice. Grand Jury Reform, Report of the Committee on Federal Legislation and the Committee on Civil Rights, of the Association of the Bar of the City of New York; M. Frankel and G. Naftalis, The Grand Jury, An Institution on Trial (Hill and Wang, 1977).

The Need for Broad Based Participation by All Segments of Society.

One recognized reform is the extension of participation in the grand jury to all segments of society. The grand jurors, it is complained, are too old, too white, too male, too middleclass, too oriented toward prosecution. See J. Van Dyke, The Grand Jury: Representative of Elite? 28 Hastings L. Rev. 37, 58-62 (1976).

The notorious incident concerning the indictment of Black Panther Bobby Seale is oft used to illustrate the

problem. There, the 73 year old Connecticut sheriff hand-picked a grand jury "of people he knew and liked" to serve as a New Haven grand jury. They included fellow members of the Elks Club, his barber, and a former jailor. With one exception, all were white. All were middle aged or older, all were middle class. They were drawn from the various twenty-six townships of New Haven County. In no realistic sense were they "peers" of the young, black, urban dwelling accused from the lower socio-economic classes of society. The grand jury indicted Seale for murder on the uncorroborated testimony of a government informer; and he remained in jail for two years without bail until freed by a split verdict of the petit jury. The Grand Jury: Representative or Elite?, 28 Hastings L. Rev. at 46-48. H. Schwartz, Demythologizing The

Historic Role of the Grand Jury, 10 American Criminal L. Rev. 701, 760-761 (1972).

The body impaneled to represent the community's conscience, the body uniquely designed to act as a shield against government oppression, must be of, from, and by the community. Broad community participation makes a difference.

An empirical study of grand jury indictments (and "no bills") returned by grand juries in Harris County, Texas; as measured by the composition of the particular grand juries, led to the following inter-related conclusions:

> a. "over representation of affluent white males has narrowed the range of social and/or political values capable of evoking disagreement among fellow jurors, or with the prosecutor."
>
> b. "homogeneous grand juries will more quickly ...

acquiesce to prosecutorial pressure than their more heterogeneous counterparts."

c. "greater representation of minorities and low income groups may, in part, serve to check the influence of the prosecutor by facilitating discussion and/or controversy in important cases."

C. Davis and C. Rowland, Assessing the Consequences of Ethnic, Sexual, and Economic Representation On State Grand Juries: A Research Note, 5 The Justice System Journal 197 (published by the Institute of Court Management, Denver, Colorado, Winter, 1979).

This Court is well aware of the need for community participation. In giving content to the concept of a "jury", this Court reminded that the:

"number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility of obtaining a representative cross section of the community.

Williams v. Florida, 399 U.S. 78, 100 (1970), upholding a jury of six members. When Georgia reduced the size of the jury in misdemeanor cases to five, this Court cried "enough". Any reduction below the six permitted in the Florida case would "promote inaccurate and possibly biased decision making", cause "untoward differences in verdicts", and "prevent juries from truly representing their communities." Ballew v. Georgia, 435 U.S. 223, 239 (1978). And New York was not permitted to substitute trial before a panel of three judges for a trial by jury:

> "the primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government

that has proceeded against him." Baldwin v. New York, 399 U.S. 66, 72 (1970).

But the function of the jury is not a matter of size alone, there is also the matter of content. "A flavor, a distinct quality is lost if either sex is excluded," Ballard v. United States, 329 U.S. 187 at 193-194. The exclusion of any distinct group denies the deliberating jury of

> "qualities of human nature and varieties of human experience the range of which is unknown and perhaps unknowable." Peters v. Kiff, 407 U.S. 493 at 503.

The Court of Appeals in United States v. Cross, 708 F2d 631 (11th Cir. 1983) illustrated this point with a footnote reference to the recent case of Bryant v. Wainwright, 686 F2d 1373 (11th Cir. 1983):

> ___, 103 S. Ct. 2096, 75 L.Ed.2d ___ (1983), Mattie Lee Bryant was indicted by a

> Florida state grand jury for first degree murder of her husband. The grand jury foreperson was a white male, and one of the issues presented to this Court was discrimination in the selection of forepersons. According to the state trial court, the shooting of her husband, allegedly an act of self defense against his beatings, was "probably second degree [murder] or manslaughter at most." See Appellant's Brief at 31, Bryant v. Wainwright, No. 81-5483. In cases such as Mattie Lee Bryant's which present sensitive sexual or racial issues, the composition of the grand jury and the sex and race of its foreperson conceivably could be of critical importance.

708 F2d at 736-373, n. 8.

Similarly in this case. Petitioner was the long time President of the North Carolina AFL-CIO, well known for his aggressive stance on behalf of minorities, and women's rights. Petition for Certiorari, p. 23. The indictment grew out of a continuing series of contracts to train the

unemployed (mostly blacks and women) for decent job opportunities. Petition for Certiorari, pp. 4-5. Audits of CETA contracts in general disclosed 379 with "questioned costs", 55 of them with questioned costs of over $50,000. Petition for Certiorari, pp. 20, 22. Yet Petitioner was the only person ever to be prosecuted for CETA fraud in the Eastern District of North Carolina. The universal practice in all other situations is to proceed by way of administrative review, and civil suit. Petition for Certiorari, p. 20. The specific substantive charges are technical at best. Petition for Certiorari, pp. 10-15. Who can say, who can deny, here, as in Bryant v. Wainwright, above, that the composition of the grand jury "and the sex and race of its foreperson conceivably could be of critical importance."

CONCLUSION

For the reasons above set forth, the judgment below should be reversed with instructions to dismiss the proceedings against the petitioner.

Respectfully submitted,

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